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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

LUTFI ELIAS,

Defendant and Appellant.

D052705

(Super. Ct. No. SCD201413)

APPEAL from a judgment of the Superior Court of San Diego County, Leo Valentine, Jr., Judge. Affirmed with directions.

A jury convicted defendant Lutfi Elias of attempted murder (Pen. Code, §§ 664/187, subdivision (a), count 1),¹ assault with a semiautomatic firearm (§ 245, subd. (b), counts 2 and 3), discharging a firearm from a motor vehicle (§ 12034, subd. (d), count 4), making a criminal threat (§ 422, count 5), and shooting at an occupied vehicle (§ 246, count 6). It also found true the allegation that Elias was a principal in the

¹ Undesignated statutory references are to the Penal Code.

commission or attempted commission of counts 1 through 4. (§ 12022, subd. (a)(1).)

Elias had earlier admitted the special allegation that he was released from custody within the meaning of section 12022.1, subdivision (b)² when he committed the offenses alleged in counts 2, 3, 4 and 6. The court sentenced Elias to eight years eight months in prison.³ The sentence included a two-year on-bail enhancement under section 12022.1, subdivision (b).

The sole issue on appeal is whether the court erred in imposing, rather than staying, the two-year on-bail enhancement. We conclude there was no error and therefore affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Elias was involved in an altercation with Julian Cristo-Lucero at a San Diego bar. Cristo-Lucero, who had just met Elias's estranged girlfriend Janice Bongato, intervened

² Section 12022.1, subdivision (b) reads: "Any person arrested for a secondary offense which was alleged to have been committed while that person was released from custody on a primary offense shall be subject to a penalty enhancement of an additional two years in state prison which shall be served consecutive to any other term imposed by the court."

³ The court computed the sentence as follows: count 1—the low term of five years plus a one-year enhancement pursuant to section 12022, subdivision (a)(1); count 2—the low term of three years plus the one-year section 12022, subdivision (a)(1) enhancement, stayed pursuant to section 654; count 3—the low term of three years plus the one-year section 12022, subdivision (a)(1) enhancement, to be served concurrently with the sentence in count 1; count 4—the low term of 16 months plus the one-year section 12022, subdivision (a)(1) enhancement, stayed pursuant to section 654; count 5—one-third the midterm of eight months to be served consecutively; and count 6—the low term of three years, stayed pursuant to section 654. The court also sentenced defendant to an additional two years for the section 12022.1, subdivision (b) enhancement. As we shall explain, it is unclear whether the court attached that enhancement to count 6 or one of the other counts.

to prevent Elias from taking Bongato with him when he left the bar. Codefendant Will Irvin told Cristo-Lucero that he was "going to get his heat." Irvin and Elias left the scene in Irvin's car. A short time later, the two men pulled up next to the car occupied by Cristo-Lucero and his girlfriend Ja'Net Vasser. Irvin, the driver, was holding a gun. Cristo-Lucero and Vasser heard gunshots as they sped away. Once back at their apartment, Cristo-Lucero and Vasser found a bullet hole on the passenger side of their car near the gas tank. A detective discovered another bullet hole in the back of the front passenger seat.

The court announced Elias's sentence at the close of a lengthy sentencing hearing. It addressed each count in sequence, staying the sentences and section 12022, subdivision (a)(1) enhancements in counts 2, 4 and 6. The court sentenced Elias on the section 12022.1, subdivision (b) on-bail enhancement alleged in connection with counts 2, 3, 4 and 6 after sentencing him on the substantive offense in count 6, stating: "As relates to count 6, the court selects the low term of three years, and the court stays that pursuant to Penal Code section 654. And so the overall term with the addition of Penal Code section 12022.1 subdivision (b) of two years is 8 years and 8 months." The court minutes and the abstract of judgment attached the on-bail enhancement to count 6.

DISCUSSION

Assuming that the on-bail enhancement is attached to count 6, defendant argues that the enhancement must be stayed pursuant to section 654 because the court stayed the sentence in the underlying offense. The People respond that there was no error because "the trial court did not attach the on-bail enhancement to a particular count. Rather, the

court added the two-year sentence as the final step in calculating the sentence for all offenses." These arguments raise two additional questions. First, was the court required to assign the sentence on the section 12022.1 on-bail enhancement to a particular count? Second, does the conflict between the language of the court's oral pronouncement as set forth in the reporter's transcript and the clerk's account of the proceedings as set forth in the minute order require remand? The answer to both questions is no.

The parties agree that the on-bail enhancement speaks to the nature of the offender, not the nature of the offense. (*People v. McClanahan* (1992) 3 Cal.4th 860, 870-871 (*McClanahan*); *People v. Augborne* (2002) 104 Cal.App.4th 362, 377 (*Augborne*).) Enhancements which describe the nature of the offender may be imposed only once in a particular case. (*Augborne*, at p. 377.) However, Elias disputes the People's argument that on bail enhancements "are added only once as a step in arriving at the aggregate sentence" (*People v. Garrett* (1991) 231 Cal.App.3d 1524, 1527 (*Garrett*), citing *People v. Tassell* (1984) 36 Cal.3d 77, 90, overruled on another ground in *People v. Balcom* (1994) 7 Cal.4th 414, 418), and need not be attached to a particular count. Elias notes that the on-bail enhancement was not even alleged as to count 1, which became the principal term at sentencing.

We conclude that the court properly imposed the section 12022.1, subdivision (b) on-bail enhancement. The enhancement was alleged and admitted as to count 3, and the court did not stay the sentence on that count. Because the court could impose the on-bail enhancement only once, and it was alleged and proven as to one count, there was no error.

The confusion arose because of a clerical error in assigning the on-bail enhancement to count 6, apparently because the court sentenced Elias on the enhancement immediately after it sentenced him on count 6. "As a general rule, a record that is in conflict will be harmonized if possible. [Citation.] If it cannot be harmonized, whether one portion of the record should prevail as against contrary statements in another portion of the record will depend on the circumstances of each particular case." (*People v. Harrison* (2005) 35 Cal.4th 208, 226, citing *People v. Smith* (1983) 33 Cal.3d 596, 599.)

The conflict is easily harmonized in this case. Because the section 12022.1, subdivision (b) on-bail enhancement can be imposed only once in a particular case (*McClanahan, supra*, 3 Cal.4th at pp. 870-871; *Augborne, supra*, 104 Cal.App.4th at p. 377), the language used by the court in sentencing Elias suggests that the court intended to add the enhancement as its last step in arriving at the aggregate sentence (*Garrett, supra*, 231 Cal.App.3d at p. 1527).

DISPOSITION

The judgment is affirmed. The trial court is directed to correct the abstract of judgment to show that the section 12022.1 enhancement attaches to count 3 and to forward the corrected abstract to the Department of Corrections and Rehabilitation.

BENKE, Acting P. J.

WE CONCUR:

HALLER, J.

McDONALD, J.